BRIEF IN SUPPORT OF PETITION

Opinion Below

The opinion of the Circuit Court of Appeals is reported in 128 Fed. (2d) 521.

Statement

The facts are stated in the Petition.

Specification of Errors

The errors which Petitioner will urge if the writ of certiorari is allowed are that the Circuit Court erred:

1. in holding that the denial of a discharge in bankruptcy because of a prior discharge within six years, acts as a bar to a discharge in a subsequent bankruptcy proceeding brought after the expiration of six years from the prior discharge.
2. in holding that the bankrupt was not entitled to a stay of proceedings under section 11, subdivision a of the Bankruptcy Act.

Summary of Argument

POINT I—The refusal of a discharge because of a prior discharge within six years, stands on a different footing from a refusal on any other ground set forth in Section 14c of the Bankruptcy Act.

POINT II—Section 11a of the Bankruptcy Act, in order to be consistent with Section 14c of the Bankruptcy Act, should be construed to permit a stay of proceedings of those claims dischargeable in bankruptcy.

POINT I

The denial of a discharge because of a prior discharge within six years, does not act as a bar to a discharge in a subsequent bankruptcy proceeding brought after the expiration of six years from the prior discharge.

Prudential Loan v. *Robarts,*
52 Fed. (2d) 918 (C. C. A. Fifth Circuit);
In the Matter of Dierck,
37 Am. B. R. (n. s.) 198 (U. S. D. C. S. D. N. Y.);
In re Simmerly,
38 Am. B. R. (n. s.) 425 (U. S. D. C. N. D. Ohio);
Collier on Bankruptcy,
14th Edition, Page 1371;
45 Harvard Law Review 1110.

In the case of *Prudential Loan* v. *Robarts* (*supra*), the Court, in a well considered opinion, squarely set forth the principle applicable to the present case, in the following clear and succinct language:

> "Manifestly the mere adjudication that Robarts was not on April 1, 1928 entitled to a discharge because six years had not elapsed since his last discharge on August 23, 1923 could not prove him disentitled on November 29, 1929. The refusal of a discharge because of a prior discharge within six years stands on a different footing from a refusal on any other ground set forth in Title 11 U. S. C. Section 32(b), 11 U. S. C. A. 32(b). The other grounds all involve reprehensible conduct of the bankrupt which Congress intended to punish by a perpetual refusal to discharge him from the claims of his then creditors. The purpose in adding the ground relating to the prior discharge within six years was not to punish but only to postpone a second discharge for that period of time."

The Court then said (at p. 920):

> "We conclude that a discharge denied on the sole ground that six years had not elapsed since a prior discharge is not a bar to a discharge applied for in another bankruptcy proceeding after the expiration of six years."

In the *Matter of Dierck* (*supra*), Judge Patterson writing for the United States District Court, Southern District of New York, said:

> "The second proceeding was altogether futile so far as discharge from debts was concerned, because any application for discharge that might have been made in it would necessarily have been within the prohibited six years period. Under the circumstances the failure to get a discharge in that proceeding did not render this debt bankruptcy-proof forever. On this feature Prudential Loan & Finance Co. v. Robarts (C. C. A. 5th Circuit), 19 Am. B. R. (N. S. 8, 52 Fed. [2nd]) 918, is directly in point. Nothing that has happened in the two preceding bankruptcies, therefore, will prevent a discharge in the present bankruptcy from having operative effect on the debt owed to this creditor."

The case of *In re Simmerly*, 38 A. B. R. (n. s.) 425, decided December 20, 1938, appears to be the latest case in which the question at issue was passed on. The Court there followed the doctrine set forth in the *Dierck* case and also the *Prudential Loan* case.

The *McCausland* case, upon which the court below based its decision, is not entitled to any consideration as against the authorities cited by petitioner's counsel.

The judge writing the opinion in that case, in referring to the question of a distinction between the refusal of a discharge because a prior discharge had been allowed within six years and the refusal of a discharge because of some fraudulent act or other condition specified in the Bankruptcy Act, said: "I have made a search of the law in an endeavor to find whether such a distinction may be applied and am unable to find anything which supports it."

Apparently, if he had been able to find anything in his search of the law to support such distinction, his decision might well have gone the other way. His search of the law was apparently not altogether thorough, or he would have found the *Prudential Loan* case, 52 Fed. (2d) 918 (decided in October 1931 by the Circuit Court of Appeals for the Fifth Circuit), which not only supports the distinction, but establishes it with such force and clarity, that we find that case being cited by other courts with full approval.

Even considering the question *de novo,* the result reached in the *Robarts, Dierck* and *Simmerly* cases is correct in principle.

The situation is analogous to a case, where under some provision of law (or contract) a claimant is required to allow a certain time to elapse before instituting a proceeding to enforce his claim. For example, under certain statutes a claimant is required to wait a certain period of time after presenting his claim against a municipality before bringing suit; in some instances, a six month waiting period is prescribed; in other instances a ninety (90) day waiting period is prescribed.

Similarly, under certain forms of insurance policies or under bills of lading issued by steamship companies or contracts of passage between a steamship company and passengers, the contract may contain a provision requiring the claimant to allow a certain waiting period to elapse after presenting a claim, before bringing a proceeding to enforce the claim under the policy or agreement in question.

Assuming that in any of the foregoing cases a claimant instituted his proceeding before the prescribed waiting period had elapsed and that in that proceeding he was defeated because his proceeding had been brought prematurely, can it possibly be claimed that that would be *res adjudicata* barring him from a recovery in a subsequent proceeding instituted by him after the prescribed waiting period had elapsed.

Likewise in the instant case, we submit that the bankrupt brought his second bankruptcy proceeding prematurely

because he did not allow six years to elapse subsequent to his discharge in the first proceeding. The denial of his discharge in the second proceeding upon the ground that this proceeding had been brought prematurely should not be held to constitute *res adjudicata* so as to prevent him from instituting a third proceeding after the six year period has elapsed, and obtaining his discharge in this third proceeding.

That is exactly in accord with the decisions in the *Robarts, Dierck* and *Simmerly* cases above referred to.

POINT II

Where a claim is dischargeable in bankruptcy, the bankrupt is entitled to stay a suit thereon under Section 11 subdivision a of the Bankruptcy Act. The Court below therefore erred in vacating the stay.

Section 11, subdivision a of the Bankruptcy Act, specifically provides for staying a suit based upon a claim dischargeable in bankruptcy.

The Court below, in vacating the stay, did so on the ground that the further provision in Section 11, subdivision a of the Bankruptcy Act provides "that such stay shall be vacated by the Court if, within six years prior to the date of the filing of the petition in bankruptcy such person has been adjudicated a bankrupt."

In adopting this view, we respectfully submit that the Court below erred. As pointed out in Collier on Bankruptcy, 14th edition at page 1155, this proviso for vacating a stay is new, and was added by the 1938 Act for the purpose of consistency with the terms of Section 14c (5) of the Bankruptcy Act.

Section 14c (5) provides that a discharge shall be denied where the bankrupt has within six years prior to bankruptcy, been granted a discharge.

Of course, if the bankrupt has within six years prior to the present bankruptcy been granted a discharge, so that

he cannot get a discharge in the present proceeding, there would be no reason for granting him a stay, staying a creditor from enforcing his claim, since this claim would in no event be discharged in the bankruptcy proceeding. The obvious purpose of the proviso in Section 11a for vacating a stay was to cover this situation.

Section 11a refers to the right of courts to grant stays of suits pending at the time of the filing of the petition, when such suits are founded upon a claim from which a discharge would be a release.

In re Alvino, 111 Fed. (2d) 642 U. S. C. C. 2nd Circuit;
In re Scheffler, 68 Fed. (2d) 902 U. S. C. C. 2nd Circuit.

If the bankrupt is entitled to a discharge in the present proceeding despite the fact that he was denied a discharge in a prior proceeding (as is the situation in the case at bar), there is no reason for denying him a stay. To deny him a stay or to vacate a stay granted him, would lead to the absurd result that the creditor would be permitted to enforce his claim by collecting perhaps in full while the bankruptcy proceeding was pending, even though at the conclusion of the proceeding the claim would be discharged by the discharge granted to the bankrupt. Furthermore, to permit this, would result in allowing the creditor whose claim is in suit to obtain a preference.

The absurdity of this result makes it apparent, that the true rule to apply to the granting or non-granting of a stay, should be whether the claim is one which is or is not dischargeable in the bankruptcy proceeding. If the claim is dischargeable, then the bankrupt is entitled to a stay of the suit based upon the claim; only if the claim is one not dischargeable, should the stay be vacated.

As already demonstrated under Point I, the claim of the respondent in the instant case is dischargeable in the present bankruptcy proceeding. It follows that the bankrupt was therefore entitled to the stay which was granted to him by the District Court, and that the vacatur of this stay by the Circuit Court was erroneous.

CONCLUSION

For the reasons heretofore assigned, it is respectfully submitted that the case is one which justifies the issuance of a writ of certiorari.

Respectfully submitted,

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